

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
D. P. MARSHALL, JR., JUDGE

DIVISION II

CACR06-979

9 May 2007

DUSTIN L. MCKINNEY,
APPELLANT

V.

AN APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT
[CR2004-104]

STATE OF ARKANSAS,
APPELLEE

HONORABLE JAMES ROBERT
MARSCHEWSKI, CIRCUIT JUDGE

AFFIRMED

Dustin McKinney pleaded guilty to theft by threat and later to burglary and theft. In each case, the circuit court suspended his sentence. One of the conditions of his suspended sentences was that he not violate any laws. In June 2006, the circuit court revoked McKinney's suspended sentences based on his commission of battery in the third degree. Ark. Code Ann. § 5-13-203(a)(3) (Repl. 2006).

The alleged battery occurred when McKinney's white pitbull, Snugs, escaped from his yard and bit Sharon Sicard on the leg as she passed by his house. Sicard was treated at an emergency room and evaluated by a plastic surgeon. Her leg remains scarred and numb. McKinney had three pitbulls in his yard. These were big dogs, weighing between sixty and seventy pounds and standing about two feet high. At the revocation hearing, one of McKinney's neighbors testified that she saw Snugs leap over

McKinney's three-foot high fence and bite Sicard. The neighbor also testified that McKinney's three dogs were rarely on chains. The proof showed that McKinney's dogs had gotten out of his yard before by jumping the fence and had chased and sometimes bitten people. McKinney admitted that Snugs had been involved in at least one other biting incident. In challenging the sufficiency of the evidence, McKinney mainly argues that it is unclear whether Snugs or his tan dog was involved in the previous incidents.

At the revocation hearing, the circuit court found that Snugs had a propensity to harm people and could, therefore, be considered a deadly weapon. McKinney challenges this finding on appeal, but we affirm it on the authority of *Duke v. State*, 77 Ark. App. 263, 272, 72 S.W.3d 907, 912–13 (2002). To be sure, McKinney's actions were not as serious as those of the defendant in *Duke*, a criminal prosecution for second-degree battery. Duke's dogs roamed at will, had a history of attacking other animals in the neighborhood, had twice bitten Duke's neighbor, and had chased a man into a nearby business. 77 Ark. App. at 272, 72 S.W.3d at 912. The preponderance of the evidence nonetheless supports the circuit court's conclusion that McKinney committed third-degree battery by negligently causing Sicard's physical injury with a deadly weapon—his dog Snugs. The court concluded that McKinney should have been aware of the substantial and unjustified risk of harm in allowing Snugs, who was known to be aggressive, to escape from his yard. Ark. Code Ann. §

5-2-202(4)(A) (Repl. 2006). And because the circuit court's decision was not clearly against the preponderance of the evidence, we affirm the revocation of McKinney's suspended sentences. *Richardson v. State*, 85 Ark. App. 347, 350, 157 S.W.3d 536, 538 (2004).

Affirmed.

VAUGHT and HEFFLEY, JJ., agree.